

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN SERVICES**

In Re: The Revocation of the License of  
Karey Bader  
3013 Salem Avenue South  
St. Louis Park, Minnesota 55416  
to provide family day care under Minnesota  
Rules, parts 9502.0300 to 9502.0445

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 9:30 a.m. on August 20, 2002, at the Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota. The hearing was recessed at the end of that day, and it resumed on September 10, 2002. The OAH record closed at the end of the hearing on September 10, 2002.

Vicki Vial-Taylor, Assistant Hennepin County Attorney, Health Services Building, 525 Portland Avenue, 12<sup>th</sup> Floor, Minneapolis, Minnesota 55415, appeared at the hearing as attorney for Hennepin County (the County) and the Minnesota Department of Human Services (the Department). Patrick R. Gillespie, Attorney at Law, 9945 Ebert Road, Rogers, Minnesota 55374, appeared at the hearing for the Licensee, Karey Bader.

**THESE FINDINGS OF FACT, CONCLUSIONS, AND  
RECOMMENDATIONS ARE PUBLIC, BUT THE HEARING RECORD ON  
WHICH THEY ARE BASED CONTAINS INFORMATION THAT IS NOT  
PUBLIC.**

**NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Human Services will make the final decision after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minnesota law,<sup>1</sup> the Commissioner may not make her final decision until after the parties have had access to this

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<sup>1</sup> Minnesota Statutes, section 14.61 (2000). (Unless otherwise specified, citations to Minnesota Statutes refer to the 2000 edition.)

report for at least ten days. During that time, the Commissioner must give each party adversely affected by this report an opportunity to file exceptions and present argument to her. Parties should contact the office of Linda Anderson, Acting Commissioner of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155, to find out how to file exceptions or present argument.

## **STATEMENT OF ISSUES**

(1) Whether, after November 13, 2000, Ms. Bader committed violations of the statutes and rules that apply to providers of family day care.

(2) Whether Ms. Bader violated the terms of the conditional license that the Department issued to her on November 13, 2000.

(3) Whether Ms. Bader's license to provide family day care should be revoked because of violations of the terms of her conditional license and of family day care program statutes and rules.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

## **FINDINGS OF FACT**

### **Background**

1. Karey Bader resides at 3013 Salem Avenue South in the City of St. Louis Park, Hennepin County, Minnesota.

2. For approximately fifteen years, Ms. Bader has held a license issued by the Department and the County, pursuant to Minnesota Rules, Chapter 9502, to provide family day care at her home in St. Louis Park.<sup>2</sup>

3. Ms. Bader is currently licensed to provide day care for fourteen children.<sup>3</sup> However, at present she only provides care for four children throughout the workday and two or three more before and after school.<sup>4</sup>

4. Before and after being licensed, Ms. Bader has participated in the training that the Department requires for licensed childcare providers.<sup>5</sup>

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<sup>2</sup> Testimony of Karey Bader.

<sup>3</sup> Testimony of Karey Bader.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* See Minn. R. pt. 9502.0385. (Unless otherwise specified, citations to Minnesota Rules refer to the 2001 edition.)

## First Conditional License

5. On September 16, 1992, and again on June 3, 1994, one of Ms. Bader's dogs bit day care children in her care. In neither case did the bite break the skin. However, on February 13, 1995, one of her dogs again bit a child in her care. In the latter case, the bite broke the child's skin, and some bleeding occurred.<sup>6</sup>

6. Between October 1993 and August 1994, County day care licensing personnel inspected Ms. Bader's home and detected unpleasant animal odors, insect infestations, damaged children's furniture, and a lack of cleanliness that included the presence of dust and cobwebs. They also found that Ms. Bader was caring for one more child than her licensure permitted.<sup>7</sup>

7. In November 1994, the City of St. Louis Park's health inspector investigated a complaint about the physical condition of Ms. Bader's home and conducted an inspection of the premises. The inspector found that soffits and fascia were missing from the roof above the front door, that there were broken windows in the attic, basement, and first floor, that there was evidence of dogs having defecated and urinated in the house, that some smoke alarms were inoperable, that there was a broke light fixture in the bathroom, that electrical work in the attic did not conform to code, and that construction inside the home was incomplete.<sup>8</sup>

8. On July 31, 1995,<sup>9</sup> the Department notified Ms. Bader that it was suspending her day care license for violations of sanitation and health rules,<sup>10</sup> rules relating to physical environment,<sup>11</sup> and rules relating to licensed capacity limits.<sup>12</sup> Thereafter, Ms. Bader appealed the suspension.<sup>13</sup>

9. While Ms. Bader's appeal was pending, she corrected many of the licensure violations that had resulted in the suspension and agreed to certain corrective actions regarding others. On July 9, 1997, the Department, the County, and Ms. Bader entered into a Settlement Agreement. Under the agreement, both the suspension and Mrs. Bader's appeal were withdrawn, her license was placed on probationary status for twelve months, and she agreed to imposition of five conditions on her licensure. The parties agreed that failure to

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<sup>6</sup> Exhibit 2.

<sup>7</sup> *Id.*; Exhibit 3.

<sup>8</sup> *Id.*

<sup>9</sup> Exhibit 2.

<sup>10</sup> Minn. R. pt. 9502.0435.

<sup>11</sup> Minn. R. pt. 9502.0425.

<sup>12</sup> Minn. R. pt. 9502.0365.

<sup>13</sup> Exhibit 3.

comply with the conditions would be grounds for further negative licensure actions.<sup>14</sup>

10. Ms. Bader complied with the conditions imposed on her probationary licensure status, and on or about July 9, 1998, her licensure status again became unconditional.<sup>15</sup>

## **Second Conditional License**

11. On May 17, 2000, County day care licensing personnel made an unannounced inspection of Ms. Bader's home to investigate complaints of unclean and unsanitary conditions there. Ms. Bader was not at her home at the time of the inspection, but a nanny whom she had hired to assist with day care was present. The following conditions existed in the home at the time of the inspection:

[T]he licensors noted a foul odor of animal feces originating from an overflowing cat litter box located in the bathroom and accessible to children in care. Also, in the bathroom, the licensors observed clothing on the floor; the bathroom entry was cluttered; the bathroom floor was dirty; and toxic items were accessible to children. In the kitchen the licensors observed dirty dishes on a dirty kitchen counter; a dirty floor; partially consumed bottles of infant formula and other improperly stored food items; garbage, scissors, plastic bags, and Lysol cleaner accessible to children; and flammable materials stored on the stove.

The living room carpet was soiled; wiring was exposed from the ceiling; and cans, salt, and other debris was scattered around the living room and accessible to children. The dining room floor was dirty; the dining room table was cluttered; and improperly stored hazardous items including plastics, a hammer, a screwdriver, and other tools were in a box next to the table and accessible to children. In the foyer, accessible to children, the licensors observed a door off the hinges and leaning against a wall; an open, cluttered closet containing building materials; and a bedroom that was cluttered with clothes and dirty dishes.

Outside, the licensors observed piles of animal feces in the front yard; a paint can containing dog feces on the front deck; building materials under the front deck; an uncovered garbage container next to the front deck; a rusted grill, a opened box of shingles, other hazardous items in the back yard play area; and the grass in both the front and back yard was in need of mowing.<sup>16</sup>

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<sup>14</sup> Exhibit 2.

<sup>15</sup> *Id.*; testimony of Tim Hennessey.

<sup>16</sup> Exhibit 4.

12. As a result of the conditions at Ms. Bader's home described in Finding No. 11, the Department issued an Order of Conditional License to her on November 13, 2000. That adverse licensure action was again based on violations of sanitation and health rules<sup>17</sup> and rules relating to physical environment,<sup>18</sup> as well as rules relating to water, food, and nutrition<sup>19</sup> and to reporting requirements.<sup>20</sup> The Order allowed Ms. Bader to continue operating her day care program for a period of one year, but only under the following conditions:

1. You follow and comply with all parts of Minnesota Rules, parts 9502.0300 to 9502.0300 . . .
2. No variances to age distribution or capacity will be granted during the conditional period.
3. You submit a written plan to Hennepin County indicating how you will ensure that your home will be properly maintained, adequately ventilated, and free from rubbish, dirt, clutter, and foul odors.
4. Floor areas occupied by children must be vacuumed, swept, and/or washed on a daily basis. Kitchen and bathroom counters must be cleared and cleaned daily; dirty dishes must be stacked near the sink and washed daily; and the stove top must not be used for storage of flammable materials.
5. Food and infant formula must be properly stored and/or refrigerated; toxic substances and hazardous items, including construction supplies and cleaning equipment must be properly stored and inaccessible to children; trash and other unusable items shall be placed in appropriate garbage receptacles, both indoors and outdoors, and removed from your home daily. Indoor and outdoor garbage and rubbish containers must to (sic) be inaccessible to infants and toddlers.
6. Both the inside of your home and the outdoor play areas used by children must be clean; maintained in good condition; and free from animal waste and other contaminants.
7. Cat litter boxes shall be kept clean and odor free. The cat litter boxes shall not be located in an area that is accessible to children.
8. If you are unable to maintain the premises in satisfactory condition on your own, you will be expected to utilize an independent housecleaning service on a weekly basis. The housekeeping service must be approved by Hennepin County.

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<sup>17</sup> Minn. R. pt. 9502.0435.

<sup>18</sup> Minn. R. pt. 9502.0425.

<sup>19</sup> Minn. R. pt. 9502.0445.

<sup>20</sup> Minn. R. pt. 9502.0365.

You must provide verification of the services used to Hennepin County on a monthly basis. You must also provide Hennepin County with a release of information that will allow Hennepin County to independently verify the services provided.

Finally, the Order of Conditional License specifically provided that “[f]ailure to comply with the stipulations of your conditional license or any other provisions of Minnesota Rules and Laws may result in revocation of your license.”<sup>21</sup>

13. On November 20, 2000, Hennepin County licensing personnel scheduled an in-home visit with Ms. Bader to discuss issues relating to her most recent conditional licensure.<sup>22</sup> The County assigned Tim Hennessey, a senior social worker and quality assurance specialist, to monitor Ms. Bader’s compliance with the licensure conditions that had been imposed. Among other things, it was Mr. Hennessey’s responsibility to make monthly unannounced visits to Ms. Bader’s home to ensure her compliance with conditions. Eileen Banks, a senior social worker and licensing specialist, had been Ms. Bader’s licensing worker for nearly eleven years. She continued in that capacity after the conditional license was issued on November 13, 2000.<sup>23</sup>

### **Subsequent Violations of License Conditions and Rules**

14. On November 30, 2000, Mr. Hennessey and Ms. Banks held an initial, joint meeting with Ms. Bader to discuss compliance with licensure conditions.<sup>24</sup> Upon inspection, the social workers noted that the condition of the premises was much improved from what it had been the previous summer. Some licensing violations were noted, but none amounted to real hazards or dangers. Because of that and because Ms. Bader had made significant progress in improving the conditions in her home, Mr. Hennessey and Ms. Banks issued no correction orders at that time.<sup>25</sup> Mr. Hennessey emphasized to Ms. Bader that any further licensing violations could result in further negative licensing actions.<sup>26</sup>

15. During the November 30, 2000, meeting with Ms. Bader, Mr. Hennessey and Ms. Banks clarified and emphasized two terms of the licensure conditions. First, the order did not specify a time when Ms. Bader’s written home maintenance plan had to be submitted to the County. Mr. Hennessey gave her until December 30, 2000, to submit that plan. Second, the order required Ms. Bader to engage a cleaning service if she herself was unable to maintain her home in a condition that was safe and healthy for children. Mr. Hennessey and

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<sup>21</sup> Exhibit 4.

<sup>22</sup> Exhibit 5.

<sup>23</sup> Testimony of Tim Hennessey and Eileen Banks.

<sup>24</sup> *Id.*; Exhibits 6 and 7.

<sup>25</sup> Testimony of Tim Hennessey; Exhibits 7 and 8.

<sup>26</sup> Testimony of Tim Hennessey.

Ms. Banks emphasized that before engaging any cleaning service, Ms. Bader needed to obtain the County's express prior approval.<sup>27</sup>

16. On January 9, 2001, Mr. Hennessey made his first unannounced compliance inspection of Ms. Bader's home. Although the yard and exterior areas of the home appeared to be in good condition, he noted several rule violations inside the home:<sup>28</sup>

- a. There were crumbs and larger, uneaten pieces of food on the living room carpet.<sup>29</sup>
- b. There were toxic substances stored in the bathroom medicine chest and vanity where they were accessible to children.<sup>30</sup>
- c. A laundry chute had been installed in the bathroom that opened at floor level where it presented a hazard for children.<sup>31</sup>
- d. There were dog chains and cat litter scoops in the kitchen where they were accessible to children. Also, some of the kitchen flooring had come loose and presented a tripping hazard.<sup>32</sup>
- e. Butter, infant formula, and other perishable items were left out in the open in the kitchen rather than being refrigerated.<sup>33</sup>

17. Mr. Hennessey issued a correction order for rule violations associated with the conditions described in Finding No. 16.<sup>34</sup> He also expressed concern that the three dogs and three cats that Ms. Bader was keeping at her home were contributing to the problems.<sup>35</sup> On January 23, 2001, Ms. Bader reported to the County that she had corrected all of those conditions, and Ms. Banks verified those corrections on February 12, 2001.<sup>36</sup>

18. During his January 9, 2001, visit, Mr. Hennessey reminded Ms. Bader that she still had not submitted the written home maintenance plan that the Order of Conditional License had required and that was due on December 30, 2001. Ms. Bader agreed to submit that plan no later than January 19, 2001.<sup>37</sup>

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<sup>27</sup> Exhibit 6; testimony of Tim Hennessey.

<sup>28</sup> Exhibits 9 and 10.

<sup>29</sup> See Minn. R. pt 9502.0435, subp. 1.

<sup>30</sup> See Minn. R. pt 9502.0435, subp. 5.

<sup>31</sup> See Minn. R. pt 9502.0435, subp. 6.

<sup>32</sup> See Minn. R. pt 9502.0435, subp. 6.

<sup>33</sup> See Minn. R. pt 9502.0445, subp. 4.

<sup>34</sup> Exhibit 10.

<sup>35</sup> Exhibit 9.

<sup>36</sup> Exhibit 10.

<sup>37</sup> Testimony of Tim Hennessey; Exhibits 7 and 9.

Mr. Hennessey did not receive the plan until January 31, 2001.<sup>38</sup> Noting that Ms. Bader's plan did not address the issues of adequate ventilation and keeping the home free of foul odors, Mr. Hennessey requested her to address those issues in a revised plan no later than February 28, 2001.<sup>39</sup>

19. On February 13, 2001, Mr. Hennessey made his second unannounced compliance visit at Ms. Bader's home. At that time, he noted the following rule violations inside her home:<sup>40</sup>

- a. The living room carpeting was soiled and needed vacuuming.
- b. The kitchen and dining room floor areas were dirty.
- c. The bathroom floor and toilet areas were dirty.
- d. A strong odor of urine was present throughout the main floor.

While at Ms. Bader's home, Mr. Hennessey worked with her to draft appropriate revisions to her home maintenance plan in order to make it a basis for measuring her progress.<sup>41</sup>

20. Mr. Hennessey issued a correction order for rule violations associated with the conditions described in Finding No. 20.<sup>42</sup> On February 21, 2001, Ms. Bader reported to the County that she had corrected all of those conditions, and Mr. Hennessey verified those corrections on February 27, 2001.<sup>43</sup>

21. On February 21, 2001, Ms. Banks made an announced licensure renewal inspection of Ms. Bader's home. Ms. Banks found that the home's physical condition had improved from what she had observed on November 30, 2000 and also that Ms. Bader had corrected the conditions that Mr. Hennessey had noted in his correction order of February 13<sup>th</sup>.<sup>44</sup> But Ms. Banks did find some record keeping problems that had to be corrected, namely that Ms. Bader lacked provider policies for all families in care, immunization certificates for some children, and evidence of provider training. Ms. Bader also needed to update rabies shots for the animals she was keeping in the house.<sup>45</sup>

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<sup>38</sup> Exhibit 11.

<sup>39</sup> *Id.*

<sup>40</sup> Exhibits 7 and 12 through 14. See Minn. R. pt 9502.0435, subp. 1.

<sup>41</sup> Exhibit 12.

<sup>42</sup> Exhibit 14.

<sup>43</sup> *Id.*

<sup>44</sup> Exhibit 15.

<sup>45</sup> Exhibits 15 and 16. See Minn. R. pt 9502.0435, subp. 12, pt. 0351, subp. 14B, pt. 0367, and pt. 0385, subp. 2, 3, and 4.



22. Ms. Banks issued a correction order for rule violations associated with the conditions described in Finding No. 21.<sup>46</sup> On February 21, 2001, Ms. Bader reported to the County that she had corrected all of those conditions except for updated rabies shots, which she completed sometime after February 28<sup>th</sup>.<sup>47</sup>

23. On March 21, 2001, Mr. Hennessey made another compliance inspection of Ms. Bader's home. At that time, he noted the following rule violations inside the home:<sup>48</sup>

- a. Mrs. Bader was then caring for two dogs and six cats. There was an overflowing cat litter box in one of the bedrooms and a strong odor of urine throughout the house.
- b. The floor and the area around the toilet in the bathroom were dirty.
- c. The rugs in the entry were saturated with moisture and had a strange odor.
- d. A toilet brush and toxic substances had been left within reach of children in the bathroom.
- e. Dog food had been left within reach of children in the kitchen

While at Ms. Bader's home, Mr. Hennessey gave her a copy of the written home maintenance that they had been working on since November 2000.<sup>49</sup>

24. Mr. Hennessey issued a correction order for rule violations associated with the conditions described in Finding No. 23.<sup>50</sup> On March 24, 2001, Ms. Bader reported to the County that she had corrected all of those conditions, and Mr. Hennessey verified those corrections on April 4, 2001.<sup>51</sup>

25. Because of an apparent problem with the presence of animals and animal odors, Mr. Hennessey made a joint inspection of the premises on April 19, 2001, with the St. Louis Park health inspector and the city's animal control officer. Those officials did not find any violations of city ordinances. At that time, the inspectors noted a slight odor of urine that fell short of being an air quality issue.<sup>52</sup>

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<sup>46</sup> Exhibit 16.

<sup>47</sup> *Id.*

<sup>48</sup> Exhibits 7 and 17. See Minn. R. pt 9502.0435, subp. 1, 4, and 12.

<sup>49</sup> Exhibit 18; testimony of Tim Hennessey.

<sup>50</sup> Exhibit 17.

<sup>51</sup> *Id.*

<sup>52</sup> Exhibit 7; testimony of Tim Hennessey.

26. On May 29, 2001, Mr. Hennessey made another unannounced compliance inspection of Ms. Bader's day care program. At that time, he noted that the inside of the house was reasonably clean but noted problems outside.<sup>53</sup> First, he found peeling paint and paint chips along the front of the house that were accessible to children. Second, he found tools, a lawnmower, a discarded swimming pool, and a hole in the backyard that presented potential hazards for children. Mr. Hennessey also watched Ms. Bader change a diaper and noticed that she did not wash her hands or the changing surface afterward with soap and water.<sup>54</sup>

27. Mr. Hennessey issued a correction order for rule violations associated with the conditions described in Finding No. 26.<sup>55</sup> Ms. Bader did not report that she had corrected all of those conditions until July 1, 2001.<sup>56</sup>

28. On June 28, 2001, Mr. Hennessey made a monthly compliance inspection of Ms. Bader's day care program. As had been the case in May, he did not find any unsafe conditions inside the home but again found some problems outside.<sup>57</sup> First, he again found paint chips along the front of the house that were accessible to children. And he again found tools and a hole in the back yard that presented potential hazards for children. Mr. Hennessey also found a rope hanging from a tree, as well as dog feces in the back yard.<sup>58</sup>

29. Mr. Hennessey issued a correction order for rule violations associated with the conditions described in Finding No. 28.<sup>59</sup> Ms. Bader never reported that she had corrected all of those conditions.<sup>60</sup>

30. On July 26, 2001, Mr. Hennessey made a monthly compliance inspection of Ms. Bader's day care program. As in the previous two months, he did not find any unsafe conditions inside the home but again found some problems outside.<sup>61</sup> Yet again, he found paint chips along the front of the house. And although Ms. Bader had removed the tools and filled the hole that he had seen in June, Mr. Hennessey found rusty bicycles, a metal rake, and a dog scooper in the back yard that presented potential hazards for children.<sup>62</sup>

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<sup>53</sup> Exhibits 7 and 12 through 14. See Minn. R. pt 9502.0435, subp. 4, 6, 13D, and 15A.

<sup>54</sup> Testimony of Tim Hennessey; Exhibits 7 and 19.

<sup>55</sup> Exhibit 19.

<sup>56</sup> *Id.*

<sup>57</sup> Exhibits 7 and 20.

<sup>58</sup> Testimony of Tim Hennessey; Exhibits 7 and 20. See Minn. R. pt. 9502.0435, subp. 2, 6, and 12.

<sup>59</sup> Exhibit 20.

<sup>60</sup> *Id.*

<sup>61</sup> Exhibits 7 and 21.

<sup>62</sup> Testimony of Tim Hennessey; Exhibits 7 and 21. See Minn. R. pt. 9502.0435, subp. 2 and 6.

31. Mr. Hennessey issued a correction order for rule violations associated with the conditions described in Finding No. 30.<sup>63</sup> As was the case in June, Ms. Bader never reported that she had corrected all of those conditions.<sup>64</sup>

32. On October 2, 2001, Mr. Hennessey again made a monthly compliance inspection of Ms. Bader's day care program.<sup>65</sup> He found that the house needed cleaning but that lack of cleanliness itself did not present any health hazards to children.<sup>66</sup> But Mr. Hennessey did find two safety hazards inside the house—namely, toxic substances in the bathroom and belts in the living room, both within the reach of children. Outside the house, he found a paint can in the front yard, missing slats on the back porch railing, and dog feces in the back yard.<sup>67</sup> During that compliance visit, Mr. Hennessey expressed concern to Ms. Bader that the condition of her home appeared to be reverting toward an unsatisfactory status rather than continuing to improve.<sup>68</sup>

33. Mr. Hennessey issued a correction order for rule violations associated with the conditions described in Finding No. 32.<sup>69</sup> On November 16, 2001, Ms. Bader reported to the County that she had corrected all of those conditions.<sup>70</sup>

34. On November 15, 2001, Mr. Hennessey and Ms. Banks made the final monthly compliance inspection of Ms. Bader's home, since her conditional licensure was expiring in that month. Outside they found paint chips in the front yard, slats still missing from the back porch railing, gasoline cans in an open shed, a wading pool in the back yard with standing water in it, and dog feces in the back yard.<sup>71</sup> Inside they found an extension cord attached to a freezer that ran along the floor.<sup>72</sup> They also found a portable crib that was dusty and dirty and that contained a basket of clothing and a woman's ring that represented a choking hazard.<sup>73</sup> The covering of the mattress was torn, and the foam was exposed, and an object had been placed under the mattress on one end of the crib. Ms. Bader explained that she had elevated one end of the mattress at the

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<sup>63</sup> Exhibit 21.

<sup>64</sup> *Id.*

<sup>65</sup> Mr. Hennessey attempted to make a compliance inspection on August 28, 2001, but Ms. Bader was not at home at the time. (Exhibit 7) There is no record of a September 2001 compliance inspection.

<sup>66</sup> Exhibit 7.

<sup>67</sup> Testimony of Tim Hennessey; Exhibits 7 and 22. See Minn. R. pt. 9502.0425 and pt. 9502.0435, subp. 2, 4, and 6.

<sup>68</sup> Testimony of Tim Hennessey; Exhibit 7.

<sup>69</sup> Exhibit 22.

<sup>70</sup> *Id.* Ms. Bader did not report correction of the October violations until after Mr. Hennessey made his final compliance inspection on November 15<sup>th</sup>.

<sup>71</sup> Exhibits 7 and 23. See Minn. R. pt. 9205.0435, subp. 2, 5, and 6.

<sup>72</sup> Exhibits 7 and 23. See Minn. R. pt. 9205.0425, subp. 18.

<sup>73</sup> Exhibits 7 and 23. See Minn. R. pt. 9205.0425, subp. 9.

parents' request in order to elevate the head of the infant who was sleeping there.<sup>74</sup>

35. Ms. Banks issued a correction order for rule violations associated with the conditions described in Finding No. 34.<sup>75</sup> On November 16, 2001, Ms. Bader reported to the County that she had corrected all of those conditions.<sup>76</sup>

### **Subsequent Licensure Action**

36. After the final compliance visit, Mr. Hennessey and Ms. Banks made recommendations to the County about whether or not Ms. Bader's probationary licensure had been satisfactory and about whether or not the County should recommend further adverse licensing actions. They noted that some licensure violations had been found on every compliance and licensing inspection. And even though conditions in Ms. Bader's day care program seemed to be improving through mid-summer, after that conditions had begun to regress into an unsatisfactory state. Because of that, neither was able to conclude that Ms. Bader had been able to meet the conditions of her conditional licensure.<sup>77</sup>

37. On February 1, 2002, the Department temporarily extended Ms. Bader's day care until August 1, 2002, pending a final determination on whether further negative licensing action was warranted.<sup>78</sup>

38. On February 5, 2002, Ms. Banks conducted a licensure renewal inspection of Ms. Bader's day care program. Generally, she found the interior of the home to be odor free, clean, in good repair, and free of hazardous conditions. Ms. Banks did find that the water temperature was 150 degrees, while it should have been no higher than 120 degrees to prevent scalding.<sup>79</sup> The only other deficiencies that prompted Ms. Banks to incorporate into a correction order were record keeping problems—that is, lack of an admission form and immunization record for one child and lack of a fire drill log.<sup>80</sup>

39. After Ms. Banks' licensure inspection, the County recommended that the Department revoke Ms. Bader's day care license. That recommendation was based on the chronicity of Ms. Bader's non-compliance with program rules, as evidenced by previous negative licensing actions and the violations of

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<sup>74</sup> Exhibit 7.

<sup>75</sup> Exhibit 23.

<sup>76</sup> *Id.*

<sup>77</sup> Testimony of Tim Hennessey and Eileen Banks; Exhibit 7.

<sup>78</sup> Exhibit 24.

<sup>79</sup> Exhibits 25, 26 and 29. See Minn. R. pt. 9502.0435, subp. 15A.

<sup>80</sup> Exhibits 25, 26 and 29. See Minn. R. pt. 9502.0435, subp. 4A and 8F4.

program rules that she had committed while under the November 13, 2000, Order of Conditional License.<sup>81</sup>

40. The Department accepted the County's recommendation and on May 7, 2002, issued an Order of Revocation that revoked Ms. Bader's license to provide family childcare.<sup>82</sup>

41. Ms. Bader subsequently exercised her right to appeal the Order of Revocation, and this administrative contested case proceeding ensued.

### **Other Considerations**

42. County social workers consider Ms. Bader to be a very warm and giving person who is attentive to the needs of the children under her care. There have not been any instances of inadequate supervision or of maltreatment, abuse, or neglect of the children under her care.<sup>83</sup>

43. The parents of children under Ms. Bader's care are generally very satisfied with the services that she provides and believe that participation in her program is a positive experience for their children.<sup>84</sup>

44. No child in Ms. Bader's care has become ill or been injured as the result of any of her violations of licensing standards.

45. Revoking Ms. Bader's license to provide family childcare would create difficulties and some hardship for the parents of her day care children.<sup>85</sup> Since Ms. Bader provides after-school and drop-in childcare, having her unavailable as a provider would create particular difficulties for parents who avail themselves of those services.<sup>86</sup>

46. Since November 2001, Ms. Bader has had her house repainted to eliminate the problem of peeling paint and paint chips and has made other physical improvements to the premises.<sup>87</sup>

### **Other Findings**

47. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

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<sup>81</sup> Testimony of Tim Hennessey and Eileen Banks; Exhibit 1.

<sup>82</sup> Exhibit 1.

<sup>83</sup> Testimony of Tim Hennessey.

<sup>84</sup> *Id.*; Exhibits A, B, and C; testimony of Laura Kasper, Rosa Dickerson, Anne Dhir, Tina Dehn, and Susan Meschache.

<sup>85</sup> Testimony of Laura Kasper, Rosa Dickerson, Anne Dhir, Tina Dehn, and Susan Meschache.

<sup>86</sup> Testimony of Rosa Dickerson, Anne Dhir, and Susan Meschache.

<sup>87</sup> Testimony of Kari Bader.

48. The Memorandum that follows explains the reasons for these Findings of Fact, and to the extent that the Memorandum may contain additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

49. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS**

1. Minnesota law gives the Administrative Law Judge and the Commissioner of Human Services authority to conduct this contested case proceeding and to make findings, conclusions, and recommendations or a final order, as the case may be.<sup>88</sup>

2. The Department and the County gave proper and timely notice of the hearing, and it has also fulfilled all procedural requirements of law and rule so that this matter is properly before the Administrative Law Judge.

3. Minnesota law<sup>89</sup> establishes the burden of proof and of producing evidence in proceedings to appeal revocations of family day care licenses:

[T]he Commissioner may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the Commissioner demonstrates that reasonable cause existed, the burden of proof in hearings . . . shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the Commissioner alleges the license holder violated, at the time that the Commissioner alleges the violations of law or rules occurred.

4. A preponderance of the evidence established that between January 9, 2001, and November 15, 2001, Ms. Bader violated family day care licensing laws and rules at least sixty times. She therefore failed to establish by a preponderance of the evidence that she was in full compliance with those laws or rules during that period.

5. Minn. Stat. § 245A.06, subd. 3, provides:

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<sup>88</sup> Minn. Stat. §§ 14.50, 14.57, 14.69, and 245A.01 through 245A.16.

<sup>89</sup> Minnesota Statutes, section 245A.08, subdivision 3(a).

If the commissioner finds that the applicant or license holder has not corrected the violations specified in the correction order or conditional license, the commissioner may impose a fine and order other licensing sanctions pursuant to section 245A.07.

6. The Order of Conditional License that the Department issued to Ms. Bader on November 13, 2000, required her to “follow and comply with all parts of Minnesota Rules, parts 9502.0300 to 9502.0445 . . .” She therefore failed to comply with the conditions of that conditional licensure.

7. Minn. Stat. § 245A.07, subd. 1, provides:

In addition to making a license conditional under section 245A.06, the commissioner may propose to suspend or revoke the license, impose a fine, or secure an injunction against the continuing operation of the program of a license holder who does not comply with applicable law or rule. When applying sanctions authorized under this section, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.

8. Between October 1993 and November 2001, Ms. Bader displayed a chronic inability to maintain the home in which she provided day care services in a manner that was safe and healthy for the children under her care and that was in conformity with family day care licensing laws and rules.

9. Even though no child under her care may have suffered an illness or injury that was directly related to her numerous licensure violations, all of that violation created potential hazards to the health and safety of children served by her program.

10. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

11. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon the these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

The Administrative Law Judge therefore respectfully RECOMMENDS that the Commissioner AFFIRM the Department’s Order of Revocation dated May 7, 2002.

Dated this 10th day of October 2002.

/s/ Bruce H. Johnson  
BRUCE H. JOHNSON  
Administrative Law Judge

Reported: Tape Recorded (six tapes); No Transcript Prepared.

**NOTICE**

Under Minnesota law,<sup>90</sup> the Commissioner of Human Services is required to serve his final decision upon each party and the Administrative Law Judge by first-class mail.

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<sup>90</sup> Minn. Stat. § 14.62, subd. 1.



## MEMORANDUM

### I.

#### **The County Substantiated the Alleged Licensure Violations**

Ms. Bader argued that several of the conditions that the County found to be licensure violations between November 2000 and 2001 were actually unsubstantiated. For example, licensure rules require that outside activities be scheduled for day care children, weather permitting.<sup>91</sup> Another rule requires “an outdoor play space of at least 50 square feet per child in attendance, adjacent to the residence, for regular use, or a park, playground, or play space within 1,500 feet of the residence.”<sup>92</sup> Ms. Bader testified that during that period she never let her day care children play outside in her own yard but rather brought them to a park located within 1,500 feet of her home for outside play. She therefore argued that she should not be held accountable for any of the potentially hazardous conditions in her yard or on the exterior of her house that inspecting social workers cited in correction orders. But the ALJ did not find her testimony that she always brought the children to the park to play to be credible. The County began issuing correction orders for hazardous conditions in her yard beginning in May 2001, and the County issued correction orders for outdoor hazards during each subsequent inspection, including its final inspection on November 15, 2001. It was not until the hearing that Ms. Bader made any mention of bringing her children to the park to play, even though it would have been in her clear interest to have done so earlier, if that had been her consistent practice.

Additionally, Ms. Bader contended that the violations associated with the condition of the crib that she maintained at her home should not be considered as having been substantiated. She testified that there was a doctor’s order directing that the only infant in her care at the time sleep in a sitting position. So she argued that since the crib was not being used at the time of the inspection, no violation occurred. But again, the ALJ found credibility problems with that assertion. First, there was no evidence of any such doctor’s order other than her own testimony, and she made no such statement to Mr. Hennessey at the time. Rather her testimony at the hearing directly contradicted a statement that she made to Mr. Hennessey at the time of the inspection—namely, that she had placed an object under the mattress on one end of the crib to elevate the head of the infant who was sleeping in it.<sup>93</sup>

Ms. Bader also presented testimony from many parents of her day care children that they did not detect the unpleasant odors, lack of cleanliness, and indoor hazards that the County’s inspecting social

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<sup>91</sup> Minn. R. pt. 9502.0415. subp. 1A.

<sup>92</sup> Minn. R. pt. 9502.0425. subp. 2.

<sup>93</sup> Exhibit 7.

workers reported. First of all, most of that testimony was irrelevant, since there was no evidence that any of the parents were on the premises at the same time as the inspectors were there.<sup>94</sup> Second, all testifying parents indicated that suspension or revocation of Ms. Bader's license would cause them considerable inconvenience, and even hardship. So they all had a clear interest in minimizing any licensure violations that Ms. Bader may have committed.

In summary, because of the matters described above and other factors affecting credibility, the ALJ has concluded that all of the licensure violations that County social workers reported between January and November of 2001 did, in fact, occur.

## **II. Remedy**

Ms. Bader did not deny that at least *some* violations of licensure rules and of the licensure conditions imposed on her occurred during her most recent conditional licensure. And her arguments at the hearing were directed primarily at the appropriate remedy in this case. She argued that no further sanctions should be imposed or, at worst, she should only continue on conditional licensure for two main reasons. First, she argued that County social workers had singled her out for unreasonably close scrutiny and were requiring unreasonably close adherence to standards than with other providers. In response to that, Ms. Bader had been placed under conditional licensure in 1997, but she had subsequently relapsed into a state of noncompliance that required a second conditional licensure in November 2000. The ALJ first notes that allowing a provider two conditional licensures before imposing more serious sanctions is an unusual accommodation rather than an unusual burden. Second, in light of that history, it was not unreasonable for the County to expect and require a high level of compliance from her. Second, Ms. Bader argues that none of the substantiated violations were severe, and none resulted in injury or illness for any of the children under her care. So she argues that none of them warrant revocation, the most severe sanction available. But while no single violation may have been very severe, the sheer number—approximately sixty-one in a one year period—and a history of even more violations extending back to 1994--both argue for some kind of effective sanction. And two attempts at conditional licensure have been ineffective and unsuccessful in altering Ms. Bader's chronic inability to comply with program rules designed to assure a safe and healthy physical environment for children under care.

Since November 2001, Ms. Bader has made a number of physical improvements to her home. And during Ms. Banks' licensure renewal

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<sup>94</sup> There was only evidence from one parent about being at the home some indeterminate time after a licenser had left the premises on one occasion.

inspection on February 8, 2002, she only noted a problem with the temperature of the hot water and a few minor record keeping problems.<sup>95</sup> Nevertheless, past performance is normally a reliable indicator of future performance. And Ms. Bader has yet to establish that she can consistently comply with day care rules for some extended period of time. It is for this reason that the ALJ recommends that the Order of Revocation be affirmed.

B. H. J.

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<sup>95</sup> Exhibit 25.